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Brf. of Davies, Short & McKenney
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JAMES H. McKENNEY,
Clerk
Supreme Court of the United States.
Chickering & Gregory for D. E. (m
OCTOBER TERM, 1901.
Filed Nov. 5, 1901.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

ALPHONSINE McGREW,

Defendant in Error.

In Error to the Supreme Court of the State of California.

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
FREDERIC D. McKENNEY,
W. H. CHICKERING,
WARREN GREGORY,
Of Counsel.

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Supreme Court of the United States.

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THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,

vs.

ALPHONSINE McGREW.
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief in Opposition to Motion to Dismiss Writ of Error.

GENERAL STATEMENT.

The writ of error at bar involves interesting questions as to the effects of judgments in the newly-acquired territory of Hawaii.

Two pages are given in the motion to dimiss to the jurisdictional questions and some eight pages to the merits, indicating that this motion is not so much one to dismiss as to obtain an advance hearing on the merits, and that the questions on the merits present the real difficulty.

And the California Court apparently found them so,

for it held the case under advisement *three* years before deciding it (fols. 81–190). Some reference is made in the motion to dismiss to harsh treatment on the part of the husband (which is contrary to the evidence) (fol. 56), but this is as uncalled for as was statement of the California Court that the defense "is rather a remarkable one" (fol. 190), and that the evidence as to the wife's adultery was conflicting (fol. 192), or as would be a statement by this plaintiff in error that the defendant had married an actor and gone to France, presumably forever.

This was an action commenced in 1895, in the State Court of California by Alphonsine McGrew, the divorced wife of Henri McGrew, to recover on a policy of life insurance which had been paid to the administrator of Henri McGrew (who died October 22, 1894), under a final judgment in the Courts of Hawaii in an action brought by such administrator against this Company in 1894. The amount adjudged due was paid to McGrew's administrator, and the policy was delivered up to the company for cancellation. Mrs. McGrew is attempting, therefore, to collect the same policy over again from the Company. The administrator of Henri McGrew succeeded in the action in Honolulu on the ground that under the Hawaiian Law all the personal property of Mrs. McGrew had vested in Henri McGrew by virtue of a decree of absolute divorce on the ground of adultery.

Mrs. McGrew was a party to the Hawaiian suit for divorce, but left Honolulu April 5, 1894, while the divorce action was pending, and before McGrew's death. She commenced this suit in California, in August, 1895, and the California Court disregarded the judgments of the Hawaiian Court and gave judgment against this Company on the ground that Mrs. McGrew subsequent to the commencement of the action for divorce had changed her domicile to California and thereby removed the policy

or her beneficial interest therein from the jurisdiction of the divorce case.

In the Superior Court of the City and County of San Francisco, the plaintiff in error here, defendant there, pleaded (1) said decree of divorce, (2) the Hawaiian statute which provided that "when a divorce is decreed for the adultery or other offense amounting thereto, of the wife, the husband shall hold her personal estate forever," * * * * and averred that under the provisions of such law and decree of divorce, all rights of the said Alphonsine C. McGrew (the assured) in and to said policy of insurance passed to the said Henri G. McGrew and became his absolute property free and clear of any claims of said Alphonsine. Plaintiff in error also further pleaded the payment of the amount of said policy with interest and costs to the administrator of said Henri by virtue of the judgment of the highest court of the Republic of Hawaii and the surrender of the policy for cancellation (pp. 7 and 8).

The company thus claimed in the California Courts and claims here that the judgment of the Hawaiian Court was binding and that it is protected by such judgment not only under the decisions of this Court but also by virtue of a then existing treaty between the United States and Hawaii, which claim the Supreme Court of California denied. The treaty will be found at page 550 of "Treaties and Conventions concluded between the U. S. and other Powers" (1889). The construction of Treaties is "the peculiar province" of this Court (Jones *v.* Meehan, 175 U. S., 22), and the plaintiff in error should not be concluded on this point by a *State* Court.

The Federal Questions.

There can be no dispute but that the Federal questions were, as a matter of actual fact, fully presented to the

Courts of California, and opposing counsel do not contend that such questions were not presented. They base their motion entirely upon the way the questions were presented as shown by this record and claim that they were not presented in such a way that this Court ought to review the action by the State Court of California.

Under the circumstances of this case, viz., the former payment of this policy under the final judgment of a Court of competent jurisdiction, and this being an attempt by another party to collect the same policy, we do not think this Court will be astute to discover technical obstacles in the way of at least having all the questions in the case fully discussed before it on a regular hearing in its order.

Summary of Argument in Opposition to Motion to Dismiss.

1. The federal questions were claimed in the State Trial Court by the pleadings, proof and assignments of error, and necessarily, therefore, in the Supreme Court on appeal.

2. The federal questions were consequently claimed, as stated in Point I above, before the Supreme Court of California on appeal, and were fully presented by counsel as shown by the briefs before the latter Court.

3. The treaty in question was involved in the decision of the Supreme Court of California, and applies to this case.

4. The opinion of the Supreme Court of California expressly referred to the federal question.

5. The federal question was presented the second time to the Supreme Court in the petition for rehearing, and such petition was denied, and such decision necessarily in-

volved the federal question. *The existence of this petition for a rehearing is ignored in the moving papers.*

6. The defendant in error erroneously attempts on this motion to bring before this Court prematurely the construction and effect of the treaty. It is sufficient here to point out the general features of the question which would come before this Court when the merits are reached, in addition to what has been said in the preceding points.

This Court should not prematurely consider the case on the merits, as invited by the moving party.

POINT I.

The Federal questions were claimed in the State Trial Court by the pleadings, proof, and Assignments of Error in the Trial Court, and necessarily therefore in the Supreme Court on appeal.

The merits of this motion cannot be disposed of by the mere application of one or more of the decisions of this Court which covers perhaps only one feature of the case. When the record which we present is illumined by the broad-minded and oft-repeated test announced by this Court, that is, was the mind of the State Court directed to the fact that a right protected by treaty was relied upon, it is impossible to come to any other conclusion than that this Court has jurisdiction.

In the argument presented this Court is asked to bear in mind its unanimous statement in French *vs.* Hopkins, 124 U. S., 524, as follows:

" The record fails to show, either *expressly or by im-*
" *plication, that* any 'right, title, privilege or immunity'
" under the Constitution or laws of the United States, was
" 'specially set up or claimed' in either of the Courts
" below."

We maintain that our claim was made expressly and also by implication in the Courts of California, and in considering § 709, quoted in Brown *vs.* Massachusetts, 144 U. S., 579, the Court says the objection was not " taken in " any form, either expressly, or *by any possible inference* " *or implication before* verdict " nor afterwards.

In Butler *vs.* Gage, 138 U. S., 61, this Court says:

" The Supreme Court of the State confessedly went to judgment without any suggestion that a Federal question was presented for its determination, and not even in the petition for rehearing was any such question brought to the attention of the Court."

In Sayward *vs.* Denny, 158 U. S., 184, this Court says:

" The right on which the party relies must have been called to the attention of the Court, in some proper way, and the decision of the Court must have been against the right claimed. Hoyt *vs.* Sheldon, 1 Black, 518; Maxwell *vs.* Newbold, 18 How., 511, 518. Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved so that the State Court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the State Court can be held to have disposed of such Federal question by its decision" (Powell *vs.* Brunswick County, 150 U. S., 400, 433).

In Oxley Stove Co. *vs.* Butler, 166 U. S., 653, this Court laid down the following:

" Looking into the record we do not find that any ref-

" erence was made in the Court of original jurisdiction to " the Constitution of the United States. Nor can it be " inferred from the opinion of the Supreme Court of Mis- " souri that that Court was informed by the contention of " the parties that any Federal right, privilege or im- " munity was intended to be asserted. For aught that " appears the State Court proceeded in its determination " of the cause without any thought that it was expected " to decide a Federal question."

Submitting this case to such test, it will be manifest from what follows that it can be inferred from the California opinion that that Court was informed by contention of the plaintiff in error that a Federal right was intended to be asserted. And it would be preposterous in this case to claim that the California Court proceeded in its determination without any thought that it was expected to decide a Federal question.

This Court has thus been governed by the broadest consideration.

And in one of its cases, the citation of which we have not at hand, this Court has said one test is whether the mind of the State Court has been directed to the right claimed.

Again, this Court has frequently taken jurisdiction where the judgment of a *sister State* is pleaded as *res adjudicata* in the State Court, although *no specification in so many words was made in the pleading that such judgment violates the faith and credit clause of the Constitution, Art. IV.*

That is, the *pleading* was a sufficient compliance with the clause in § 709 "specially set up or claimed." Thus in Bell *vs.* Bell, 181 N. Y., 175, the defendant pleaded the judgment for divorce in Pennsylvania, but did not otherwise specially set up or claim any right under Const, Art. IV, *and this Court took jurisdiction.*

By parity of reasoning pleading as this company did, the Hawaiian decree and statute, "it specially set up or claimed" a right under the treaty, and a Federal question was thereby necessarily injected into the record.

Defendant in error sued in 1895 in the Courts of California upon a policy of life insurance issued in the Hawaiian Islands upon the life of her then husband—H. G. McGrew.

The insurance company defended upon the ground the interest of Mrs. McGrew in the policy had ceased upon the dissolution of the marriage tie, which had been dissolved in 1894 by the final decree of an Hawaiian Court having admitted jurisdiction of both parties.

The answer further shows that the courts of Hawaii subsequently determined in the action of *Carter, administrator*, v. *Mutual Life Insurance Co.*, 10 Hawaiian R., 117 and 570 (the opinions are submitted herewith as an appendix), that the decree referred to did operate upon the interest of Mrs. McGrew in this very policy of insurance and that the administrator of her former husband's estate was entitled to recover upon it. For that reason the company was *compelled* to pay to him the full amount with interest.

The California Court refused to follow the Hawaiian Court in the construction and effect of their own decrees and statutes and decided that Mrs. McGrew *did not* lose her beneficial interest by the divorce proceedings.

Thus the company is to be compelled (unless this Court thinks otherwise) *to pay the same policy twice* by reason of the diametrically opposite views of the courts of the two countries, notwithstanding the treaty.

The effect of this Hawaiian decree and statute upon the property involved was *the only defense* attempted. The answer shows in detail the facts conferring jurisdiction upon the Hawaiian Courts, and *claims* that by that judgment and by the Hawaiian statute, which is set out in *hæc verba*

Mrs. McGrew had ceased to be the owner of the policy. It alleged, "That under and by virtue of the foregoing "provision of law and decree of divorce, all rights of the "said Alphonsine C. McGrew in and to said policy of in- "surance did pass to the said Henri Golden McGrew and "become his absolute property, free and clear of any "claims of the said Alphonsine C. McGrew, plaintiff "herein, whatever."

The findings of the trial court and the admitted statement of facts upon which the case was tried, deal wholly with these Hawaiian judgments and Hawaiian law. And the assignment of errors (fol. 74) has for its contention the following: "The said findings of fact do not determine the issues raised by the following allegation in said answer, 'that under and by virtue of the foregoing provision of law and decree of divorce, all rights of the said Alphonsine McGrew in and to said policy of insurance did pass to the said Henri Golden McGrew and become his absolute property, free and clear of any claim of the said Alphonsine McGrew, plaintiff herein, whatsoever.'"

By thus pleading the *final adjudication of the Court of a foreign country*, involving *the operative effect of* a *statute of that country*, the defendant in error necessarily presented to the trial Court a federal question, viz.: a right claimed under a treaty then existing between that foreign country and the United States, and if the decision of the State Court is against that right it is submitted that the federal question is "specially set up or claimed" within the purview of Section 709 Revised Statutes.

For this treaty was "as much a part of the law of every State as its own law and constitution."

Hauenstein v. *Lynham*, 100 U. S., 483.

"All treaties made, or which shall be made, under the "Authority of the United States shall be the Supreme Law

"of the land ; and the Judges in every State shall be bound "thereby, any Thing in the Constitution or Laws of any "State to the Contrary notwithstanding."

Const., Art. VI.

This Court early held in dealing with a right conferred by treaty that,

"In the construction of that section the Court has never required that the treaty, or Act of Congress, under which the party claims, who brings the final judgment of a State Court into review before this Court should have been pleaded specially or spread on the record" (Per MARSHALL, C. J.).

Hickie vs. *Starke*, 1 Pet., 97.

It is submitted that this Court has never held that the Federal question must appear in the record by *direct language*. On the contrary :

"The true test is not whether the record exhibits an "express statement that a Federal question was pre- "sented, but whether such a question was decided, and "decided adversely to the Federal right. Everywhere "in our decisions it has been held that we may review the "judgments of a State Court when the determination or "judgment of that Court could not have been given "without deciding upon a right or authority claimed to "exist under the Constitution laws or treaties of the "United States, and deciding against that right. Very "little importance has been attached to the inquiry "whether the Federal question was formally raised. In "*Crowell* v. *Randall* (10 Pet., 368), it was laid down, "after a review of almost all of our previous decisions, "'that it is not necessary the question should appear on "'the record to have been raised, and the decision made "'in direct and positive terms, *in ipsissimis verbis*, but "'that it is sufficient if it appears by clear and neces- "'sary intendment that the question must have been "'raised, and must have been decided, in order to have

"'induced the judgment.' This case was followed by "*Armstrong et al.* v. *The Treasurer of Athens County* "(16 *Id.*, 281), where it was held sufficient to give this "Court jurisdiction if it appear from the record of the "State Court that the Federal question was necessarily "involved in the decision, and that the Court could not "have given the judgment or decree which they passed "without deciding it. See also *Bridge Proprietors* v. "*The Hoboken Company*, 1 Wall., 116, and *Furman* v. "*Nichol*, 8 *Id.*, 44."

Murray v. *Charleston*, 96 U. S., 442.

And a further test was given in

Sayward v. *Denny*, 158 U. S., 184.

"At all events it must appear from the record by clear and necessary intendment that the Federal question was directly involved so that the State Court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the State courts can be held to have disposed of such Federal question."

To the same effect are

Armstrong v. *Athens Co.*, 16 Pet., 281;
Detroit R. R. Co. v. *Guttard*, 114 U. S., 136;
Eureka Lake Co. v. *Yuba Co.*, 116 U. S., 410.

If this federal question is in the record there is jurisdiction, *although the State Court ignores it in its opinion.*

The decision of the alleged federal question was necessary to the judgment rendered, and hence gives jurisdiction.

Brooks v. *Missouri*, 124 U. S., 400.
Arrowsmith v. *Harmoning*, 118 U. S., 194.

And this rule is followed where a right is set up under the *third* clause of Section 709 as well as under the first and second clauses.

Furman v. *Nichol*, 8 Wall., 44.

Nor was there a *non-federal* ground upon which this decision could be placed broad enough to sustain the Court below notwithstanding error in its ruling in the federal question. For if this treaty did make the foreign law controlling *it was decisive* of the case because plaintiff below was met at the threshold by a defect in title. The property right in the policy had *passed away* by operation of law.

We claim therefore that pleading the Hawaiian decree and statute *forced* upon the trial Court a consideration of this treaty. It could have given no additional weight to the answer to have added after the statement of the decree and statute, "and defendant claims that this decree and law divested plaintiff of her interest by virtue of treaty obligations between the United States and Hawaii." For this was necessarily so

"No law has any effect of its own force beyond the limits of the sovereignty from which its authority is derived."

Hilton v. *Guyot*, 159 U. S., 113.

The Hawaiian *decree* of divorce which involved the statute should have been held to have had through comity, and independent of treaty obligations, an authoritative force in California.

But the defendant in the State Court did not rest solely upon the *judgment*, but *ex industria* pleaded also the *statute*.

This was necessary because the judgment in itself makes no mention of the property rights. They were affected by *operation of law* by reason of the decree. And by pleading this law in a California Court its express recognition by treaty became at once a *necessary* question presented for decision.

It has many times been held by this Court that pleading a prior adjudication of a United States Court necessarily raises a federal question on the record sufficient to

authorize a writ of error. For this is a claim under an *authority* exercised under the United States.

Dupasseur v. *Rochereau*, 21 Wall., 130;
Gregory v. *McVeigh*, 23 Wall., 294;
Des Moines Nav. Co. v. *Iowa Homestead Co.*, 123 U. S., 552.

It will be observed that these are "rights" claimed under the third subdivision of Section 709 and that they were not specifically mentioned other than by *pleading the judgment*.

The defendant in error claims that even if the decision of the federal treaty question was necessarily involved in this case, yet that *alone* is not sufficient under the third class of cases in § 709, but it must be "specially set up or claimed."

This point is in a way immaterial in this case, because we have fully shown above that it was "specially set up or claimed," but we think even the statement of the learned counsel is too broad. For in the case of Water Power Co. *vs.* Street Ry. Co., 172 U. S., 488, this Court says: "There is no doubt that under the third class the "federal right, title, privilege or immunity must be, *with* "*possibly some rare exceptions*, specially set up or claimed " to give this Court jurisdiction."

So that there may be exceptions to this rule of specially setting up and claiming. But we have urged that "specially set up or claimed" does not bear the technical limited construction of the moving party.

This Court has laid down the rule, "The record fails to "show, *either expressly or by implication*, that any "'right, title, privilege or immunity,' under the Consti- "tution or laws of the United States, was 'specially set " up or claimed' in either of the Courts below."

French *vs.* Hopkins, 124 U. S., 524.

This claim of the moving party at the most only puts the question back to what constitutes a specially setting up or claiming.

The main claim of the moving party is, that the writ should be dismissed because no federal question was *specially set up or claimed in the trial Court.*

But there is no such narrow holding in this Court. The cases cited by the moving party are either irrelevant, or opposed to any such contention. In Spies *v.* Illinois, 123 U. S., 181 it was, simply said that federal questions could not be raised in this Court "for the first time." Parmalee *v.* Lawrence, 78 U. S., 38, was a case where the certificate of the presiding Judge attempted to *originate* the question. Brooks *v.* Missouri, 124 U. S., 394, was a case where no rehearing was involved, and held, if decision of federal questions was necessary to judgment rendered, it is sufficient to give jurisdiction. Baldwin *vs.* Kansas, 129 U. S., 57 was a case where the State Supreme Court expressly refused to consider the question because it was not raised at the trial. Brown *v.* Massachusetts, 144 N. Y., 579, simply follows the last case. In Oxley Stove Co. *vs.* Butler Co., 166 U. S., 653, there is nothing opposed to our contentions; on the other hand, it favors them as sho n above. Water Co. *vs.* Electric Co., 172 U. S., 488 has been considered elsewhere by us, and is in our favor. In Chopin *vs* Frye 170 U. S., 120, the questions were only raised in the application for the writ of error to this Court.

POINT II.

The federal questions were consequently claimed, as stated in Point I above, in the Supreme Court of California on appeal, and were fully presented by counsel, as shown by the briefs before the latter Court.

All the matter in Point I alleged to have been before the trial Court, including the federal question, was, of course, consequently before the Supreme Court.

The briefs of the Mutual Life presenting the federal question will be found at fol. 174, and the clerk of a Supreme Court of California certifies that such briefs amongst other papers, "is a *true and correct copy of* "*recorders* (*sic*) in S. F. 1230; McGrew *es.* Mutual Life, "consisting of pages one to two hundred and twenty-nine "and same *constitute all papers on writ of error in above* "*entitled cause as shown by the records of my office*" (fol. 231).

These briefs support the position taken in Point I in that they are consistent with the claim there made, and in view of their presence, taken in connection with Point I and Point IV below, how can it be said, to use the test of this Court elsewhere alluded to, that the minds of the State Court was not directed to the Federal question? We are not *depending* on these briefs. We only claim they are consistant with our position.

It is no answer to this for defendant in error to say that they are no part of the record, for although now a copy of the opinion is required to be incorporated in the transcript by the eighth-rule, and this court looks at it for a federal question, yet this Court has said it was no part of the record.

POINT III.

The treaty in question was involved in the decision of the Supreme Court of California and applies to this case.

In the Supreme Court of California, in one of the briefs filed on behalf of the appellant company April 23d, 1898 (p. 75), almost *three* years before the decision of the case by that Court (p. 93), it was contended "that respect for the Hawaiian decree is secured by treaty stipulations, which sometimes smooth the way for the recognition, in doubtful cases, of the effect of foreign judgments upon property rights and interests," and specific reference was made to the protection claimed under the treaty between the United States and Hawaii of 1849 (p. 85).

The claim of the binding effect of the Hawaiian decree and statutes, and the applicability thereto of the terms of the treaty of 1849, was again reiterated in the petition for a rehearing (p. 103), as shown more fully under Point IV below, and was especially assigned in the petition for the writ of error as ground for its allowance (p. 109).

It must be apparent from Points I and II above, and from an inspection of the record, that the decision of the State Courts could not have been reached without the denial of the principal ground of defence pleaded by the defendant, such ground resting upon a right, privilege or immunity set up and claimed under the treaty between the United States and Hawaii. As it is, the judgment of the highest Court of the State, denying any such right, privilege or immunity is subject of review in this Court, and as it appears from the record in this case, that the foreign judgment or decree and the foreign statute were not only specially set up or claimed in the trial Court, but their effect under the terms of the treaty was also elaborately argued before judgment and reiterated

after judgment in the State Supreme Court, it would seem that the defendant company, plaintiff in error here, had done all that could reasonably be required of it to preserve its right to have the federal question, necessarily and so prominently involved in the case, reviewed by this Court.

It is well settled, of course, that the right may be set up in the Trial Court or in the State Supreme Court. "But the record does not show that the company specially "set up or claimed in the State Courts, *or either of them*, "any right under the Constitution of the United States."

Oxley Stave Co. vs. *Butler Co.*, 166 U. S., 658.

This policy was applied for by the insured in Hawaii, where he and his wife remained domiciled at the commencement of the divorce proceedings; there the first premium was paid, and there the policy first went into effect.

Mutual Life v. *Cohen*, 179 U. S., 262.

The defendant in error was served with summons and libel *in Hawaii;* and she appeared in that action and contested it to the end.

The Hawaiian law then in force provided, that in every case when a divorce was decreed "for the adultery of the wife, the husband should hold her personal estate forever."

The Hawaiian Court held, in the action of *Carter* v. *Mutual Life*, *supra* (submitted herewith as an appendix), that by the mandatory character of this statute the personal estate of the defendant was a part *of the subject matter of the suit from its commencement*, and that Mrs. McGrew could not by transferring her domicile to California pending the suit take away anything from the jurisdiction already acquired.

The Supreme Court of California in its opinion held

that the statute of Hawaii did not apply until the divorce decree was rendered, and that inasmuch as Mrs. McGrew was domiciled in California at that time, it did not therefore affect her property rights.

The latter Court quite ignored the proposition that Mrs. McGrew had already appeared in the action for divorce, and that the alienation of the wife's personal estate was, under the Hawaiian law, a *necessary incident* of every action for divorce upon the special ground mentioned.

By Section 709 of the Revised Statutes of the United States, it is provided that:

"A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statue of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties of laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States; and the proceeding upon the reversal shall be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to the court from which it was so removed.

"The Supreme Court may re-affirm, reverse, modify, or affirm the judgment or decree of such State Court, and may, at their discretion, award execution, or remand the

same to the Court from which it was removed by the writ."

It is claimed that the decision of this Court herein is against a right claimed to be conferred by a treaty existing between the United States and the Republic of Hawaii. Of this treaty this Court will take judicial cognizance (Section 1875 C. C. P.); and it is as much a part of the local law of the State of California as its own Constitution (Hauerstein *vs.* Lynham, 100 U. S., 483). This treaty provided:

"If the question should arise among several claimants as to which of them said goods belonged, the same should be decided finally by the laws and judges of the land wherein the said goods are."

The term "goods" here refers to personal property, which in this case was an insurance policy. This policy was applied for and was delivered by the agent of the company in Honolulu; its premiums were paid there, and there it took effect. It was, therefore, so far as the three parties to it, namely: the insured, the beneficiary and the company are conerned, an *Hawaiian contract.*

It was in the possession of Carter when the suit was brought in Hawaii, and surrendered up to the company for cancellation after payment.

That under such conditions the domicile of the insurance company, so far as the policy was concerned, was in Hawaii, is directly decided by the Supreme Court in Mutual Life Insurance Company *vs.* Woodruff, 111 U. S., 138; and that where the first premium is paid and the policy delivered to the insured is the place where the policy takes effect, is also directly decided in Mutual Life Insurance Company *vs.* Cohen, 21 Sup. Court Rep., p. 106.

When the question arises as to the law which is to govern a particular contract, it is frequently necessary to decide that a chose in action has a *situs.* This is always

held to be where the *debtor* resides. The principle that the domicile of the owner controls, is not of universal application, and is never applied when there is an express statutory prohibition to the contrary.

We claim, therefore, that the *situs* of this insurance policy was in Hawaii, and therefore that the courts of that country had the right to finally determine to whom it belonged.

When the divorce action of McGrew *vs.* McGrew was commenced, both parties were domiciled in Hawaii, and Mrs. McGrew was served with process there. She appeared in the action and contested it from its beginning to its end. Her demurrer to the libel having been overruled, she appealed from that opinion directly to the Supreme Court (McGrew *vs.* McGrew, 9 Hawaiian Reports, 475); and another interlocutory order, ordering the guardian to pay counsel fees *pendente lite* was also appealed from (9 Hawaiian Rep., 426).

After these matters were disposed of by the Supreme Court (the practice of that country allowing an appeal to be taken before final judgment), the case was set down for trial. This trial occupied two days' time; witnesses were produced by both parties, and after the decision granting plaintiff a divorce, an appeal was attempted by the defendant to this Supreme Court. It will thus be seen that Mrs. McGrew unqualifiedly submitted herself to the jurisdiction of the Hawaiian Court, not only by appearing t erein, but also by contesting every phase of the litigation.

The effect which these divorce proceedings had upon her personal property rights was thereafter directly brought in issue by the case of Carter, Administrator, *vs.* Mutual Life Insurance Company of New York. This was an action brought upon the same policy of insurance as is now sued upon, and was based entirely upon the proposition that by the divorce the personal property of Mrs.

McGrew had passed to her husband. This was a construction by the Hawaiian Court of its own statute and is a decision by the highest Court of that country that the "goods" here in question were not the property of Mrs. McGrew. By the treaty hereinbefore referred to, this decision of the Hawaiian Court is conclusive, and the decision of this Court being diametrically opposed to the decision of the Hawaiian Court, deprives the defendant company of the right conferred by this treaty. This right as conferred by the treaty, has been claimed by the defendant as shown in Point I above. It was, therefore, embodied in the *record* of the case, because it is apparent that the California Court could not have reached its conclusion without disregarding the judgment of the Hawaiian Court. The Hawaiian Courts decided that this policy of insurance was the property of McGrew's administrator, and the California Court has decided that it was the property of Mrs. McGrew. The conclusion of the latter Court could not have been reached except by holding that the policy was *not* the property of McGrew's administrator.

The first conclusion of law of the trial Court was that this policy of insurance (fol. 11) and the moneys due thereunder never passed to said Henri G. McGrew nor did he ever hold her rights or property in said policy or money.

This is a direct finding and adjudication by the Courts of California, in opposition to the conclusion of the Courts of Hawaii. The finding of the Hawaiian Court was that the rights of plaintiff in and to this policy of insurance did pass to McGrew's administrator.

We must conclude, therefore, that the decision of the California Court is opposed to the decision of the highest Court of Hawaii concerning the title to property which was within the jurisdiction of the Hawaiian Court, all parties to which were properly domiciled there.

POINT IV.

The opinion of the Supreme Court of California expressly referred to the federal question. We regard this point, taken in connection with the others showing that the federal question was specially claimed, as conclusive against the motion to dismiss.

The moving party claims the words "by comity" in the opinion of the Supreme Court show that the latter were not considering a right under the treaty. But it is manifest that just here the Court expressly denied the treaty rights. The Court, referring to the Hawaiian decree, says it was "a decree which could not have been obtained here; "and upon an Hawaiian statute which has no force here "except *by comity*." That is, the Mutual Life was claiming the decree of divorce involved necessarily the application of the statute, and that therefore the decree and statute had force in California by virtue of the treaty, but the Court said no, it has no force by treaty, but by comity.

The plaintiff in error claims that by virtue of certain treaty obligations between the two countries, the Court of California was obliged to follow the decision of the Court of Hawaii, and that the facts presented show the *precise contingency* to which the treaty was intended to apply.

POINT V.

The Federal question was presented the second time to the Supreme Court in the petition for rehearing and denied. and such decision necessarily involved a second consideration of the Federal question by the State Court. The existence of this petition for a rehearing is ignored in the moving papers.

This point is to be considered in connection with the others, and it is not to be disposed of as though we relied upon it *alone*.

In a very recent case of Mallett *vs.* North Carolina, 181 United States Reports, 589, this Court held it was sufficient for the Federal question to be raised in the petition for rehearing provided the State Court considered such Federal question.

In the McGrew case the petition for rehearing raised fully the Federal questions and the Supreme Court of California necessarily considered them in denying such petition, and the Supreme Court of California did not decline to pass upon them.

In the Mallett case this Court, through Mr. Justice SHIRAS, writing the unanimous opinion of the Court, said :

"But we are of opinion that questions arising under "the Constitution and laws of the United States were pre- "sented in the Supreme Court of the State, and were by " that Court considered and decided against the party in- "voking their protection.

"It is true, as we learn from the first opinion filed by "the Supreme Court, that such Federal questions were "not considered by that Court, or, at all events, were not "treated as Federal questions, but as questions arising

"under State laws. But the record discloses that, after "that opinion had been filed but before it had been certi- "fied down, the defendants filed a petition for re-argu- "ment, and presented the Federal questions on which "they rely. The Supreme Court entertained the petition "and proceeded to discuss and decide the Federal ques- "tions. In support of the motion to dismiss, numerous "decisions of this Court are cited to the effect that it is "too late to raise a Federal question by a petition for a "rehearing in the Supreme Court of a State after "that Court has pronounced its final decision (Loeber "*v.* Schroeder, 149 U. S., 580; Sayward *v.* Denny, 158 "U. S., 180; Pim *v.* St. Louis, 165 U. S., 273).

"But those were cases in which the Supreme Court of "the State refused the petition for a rehearing, and "dismissed the petition without passing upon the "Federal questions. In the present case, as already "stated, the Supreme Court of North Carolina did not "refuse to consider the Federal questions raised in the "petition, but disposed of them in an opinion found in "this record (State *v.* Mallett, 125 N. C., 718). Had "that Court declined to pass upon the Federal questions "and dismissed the petition without considering them, "we certainly would not undertake to revise their ac- "tion."

It has thus been held to be sufficient to retain a case upon the docket of this Court if the Federal question was raised for the first time by a petition for rehearing, provided the State Court in denying the petition for rehearing noticed the Federal question and passed upon it.

An inspection of the opinion of the State Court in the Mallett case shows that the discussion of the Federal question raised by the petition for rehearing was embraced in six lines of print and consisted of a terse statement of the point, a denial of its appositiveness and the citation of a single authority in support of the Court's view. The discussion would have been but little less brief had it been confined to the formula "petition denied."

On principle it would seem that the right to maintain

the writ of error in the pending case would be the same. It surely cannot be that the right to relief in this Court is dependent upon whether the Judges of the lower tribunals wield facile or grudging pens. When the litigant has squarely presented the Federal question and its decision is fairly and necessarily involved in the issue, he has done all that can reasonably be required of him and the failure to provoke the State Judges into a discussion of its merits of greater or less length cannot have been intended by this Court as a logical standard by which to measure his right to maintain his writ of error here. Otherwise a hostile State Court could defeat this Court's jurisdiction by simply omitting express reference to the federal question. This Court has repeatedly said it would not tolerate any such attempt.

In the case at bar the judgments of the State Courts against the company could only have been reached as the result of the denial of the effect claimed for the Hawaiian judgment and statutes under the treaty. As it is the law of the land that Courts shall first hear and then upon consideration determine, it must be presumed that the company's defense was carefully though erroneously weighed, and no discussion of it by the State Court, however elaborate, could have disposed of it more effectually than the words "motion denied."

Thus in Chapman *v.* Goodnow, 123 U. S. 548 this Court says:

"*We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of § 709 of*

the Revised Statutes, as if it had been specifically referred to and the right directly refused."

It cannot be said that in this case the State Court declined to pass upon the Federal question distinctly raised by plaintiff in error both before judgment and in the petition for rehearing without considering them, for it was necessary for the State Courts to have considered such questions if it considered the case at all.

The question involved in this case is of novel importance. It is whether under our system of jurisprudence a party can be required by decrees of competent courts to pay to two different individuals money which he has agreed to pay to either one, but not to both.

The insurance company, the plaintiff in error, has already discharged the full measure of its obligation upon the policy in question, as the result of the decree of one court of competent jurisdiction. It remains for this court to say whether it shall again be required to pay the amount called for by the policy because the California courts, ignoring its pleas in bar and rejecting evidence offered in support thereof, has so decreed.

The federal question is clearly and distinctly presented by the record and the merits of the cause should not be decided by the Court until full opportunity has first been afforded for their discussion.

POINT VI.

The defendant in error erroneously attempts on this motion to bring before this Court prematurely the construction and effect of the Treaty. It is sufficient here to point out the general feature of the questions which will come before this Court when the merits are reached, in addition to what has been said in the preceding points. The plaintiff in error is not called upon to fully present its views on the merits, nor does it pretend to do so.

(*a.*) The claim of the moving party that the treaty does not apply because there is no showing of the citizenship of the parties is wholly untenable.

1st. Regarding the question as one arising among several claimants in the divorce case, it is apparent on the defendants' in error own showing, that the question arose between Henri G. McGrew, a citizen and subject of Hawaii, and Alphonsine McGrew, a citizen or subject of California.

The claim of the Company is that the divorce suit itself involved the ownership of the policy, and, if as the defendant in error here pretends she was a citizen of California at the time the decree was entered, the question of the divorce and the incidental question of ownership of property arose between a citizen or subject of the contracting parties to the treaty.

The moving party claims that the record shows only that Henri G. McGrew was a resident of Honolulu, and that the defendant in error at the date of the divorce was a resident of California. These parties were then, in an

international sense, citizens or subjects of each country. As a matter of fact the record clearly shows that the McGrews were both *domiciled* in Honolulu.

"In the language of the law of nations, which is always to be consulted in the interpretation of treaties, a person domiciled in a country and enjoying the protection of its sovereign, is deemed a subject of that country,"

The Pizarro, 2 Wheaton, 91.
The Freundschaft, 3 Wheaton, 154.
The Venus, 8 Cranch, 252.
U. S. *v.* Chong Sam, 47 Fed. Rep., 878.

The law will presume all persons domiciled in a country to be citizens of that country.

State *v.* Blackmo, 6 Black (Ind.), 489,

and therefore, plaintiff in error having shown the domicile of the parties, cast the burden of proving they were not citizens upon the other side.

This principle is shown by the recognition of domicile as the test of that citizenship necessary to confer jurisdiction upon the Federal Courts, since State citizenship follows domicile by operation of law.

Case *v.* Clark, 5 Mason, 70.
Popenheim *v.* India Rubber Co., 14 Fed. Rep., 707.
Burnham *v.* Rangley, 4 Fed. Rep., 775.

2d. Regarding the question as one arising among several claimants in the suit by Carter, as administrator of Henri G. McGrew therein against The Mutual Life, the question arose between the administrator of Henri G. McGrew, a citizen or subject of Hawaii, and The Mutual Life, a citizen of the United States, as to whether the policy be-

longed to the estate of Henri G. McGrew or Alphonsine McGrew.

(*b.*) It is claimed by defendant in error that the term "goods" as used in the treaty does not cover a *chose in action*, but refers only to *tangible* personal property.

As a matter of fact, the "goods" were in Hawaii when the action for divorce and the action against the Mutual Life there were begun.

The word "goods" in the treaty is a word frequently employed in treaties, and is a translation of the word "biens" used in the French version of treaties. This word "biens" includes *all* personal property.

The particular words in the treaty are used as synonymous with *personal estate*, as a reference to preceding paragraphs will show: "They shall be entitled to dispose of their personal property of every kind and description, by sale, gift, exchange, will or in any other way whatever, without the smallest hindrance or obstacle, and their heirs or representatives being subjects of citizens of the other contracting party shall succeed to their *personal goods*, whether by testament, or *ab intesto*, and may take possession thereof either by themselves or by others acting for them and dispose of the same at law, paying to the respective governments such dues only as the inhabitants of the country wherein said goods are shall be subject to pay in like cases."

The term "personal goods," which the treaty deals with, must reasonably be presumed to include all of one's personal estate, because it could not be intended to exclude the right of disposing of or succeeding to intangible property such as choses in action, stocks, bonds, etc. For this would exclude by far the greater portion of the property of the individual, and it is a general rule in the construc-

tion of treaties that a liberal construction of the rights to be claimed under it should be followed.

Sharks v. *Dupont*, 3 Pet., 242 ;
Hauenshein v. *Lynham*, 100 U. S., 242.

The particular paragraph in question then proceeds, " And if a question should arise among several claimants as to which of them *said* goods belong, the same shall be decided finally by the laws and judges of the land wherein the *said* goods are."

Thus the word " said " being referred to, its proper antecedent shows that it was the intention of the contracting parties to include by the term " personal goods " all the personal estate of the individual.

This view is strengthened by the fact that the treaty then proceeds to pass upon rights in *real property* it being the evident purpose to provide for rights in *all* property, personal and real.

The term " goods " is by no means limited to movables which have an intrinsic value, and in many cases it has been held to include choses in action and other intangible interests.

Dowdell v. *Hamm*, 42 Pa. St., 61,

where the Court said :

" The word 'goods' is *nonen generalissimum*, and when construed in the abstract the term will embrace all the personal estate of the testator, bonds, notes, money, plate, furniture, etc."

Tisdale v. *Harris*, 20 Pickering, 9 ;
Greenwood v. *Law*, 25 At. Rep., 134,
Terhune v. *Bray's Ex.*, 16 N. J. Law, 53.

No good reason is suggested which would hold that this treaty intended to secure the title to tangible personal estate, but to no other personal property, and, therefore,

the word "goods," taken in its general sense, would include this insurance policy.

(*c*) The moving party claims that no question has arisen among the several claimants as to which of them said goods belonged. We have already averted to this under "*a*" above, in which it is indicated that the question arose in the divorce case and also in the case on the policy in Hawaii.

But this is practically conceded by the moving party, because in their Point III on page 14 of the motion to dismiss, they claim that if there has been any determination of a controversy as to the ownership of this policy between several claimants, then it has been done by the California judgment. The California case was between Alphonsine McGrew and The Mutual Life. If the moving party concedes therefore that a question between claimants arose in the California case, they must necessarily concede that it arose in the Hawaiian case by the Administrator of McGrew against the Company.

(*d*) It is lastly urged by the defendant in error that, by the judgment of the California Courts, the ownership of the policy has been "finally decided by the laws and Judges of the land wherein the said goods are."

This involves the whole question on the merits. It is not concerned with the technical question raised on the motion to dismiss for want of a Federal question appearing in the record, but assumes that this Court *having taken jurisdiction* nevertheless judgment should be affirmed.

For the purposes of this motion it is not necessary to decide whether this insurance policy could have a *situs* independent of the domicile of its owner, for that owner, and in fact all others interested in the transaction, *were admittedly domiciled in Hawaii at the time the*

divorce proceedings were commenced. And therefore whether the law of the domicile of the owner or the law where the insurance was negotiated controls, is quite immaterial, because they *both are the same.*

To decide this question, therefore, the Court must pass upon the main issue, viz,—did the property right in this insurance policy form a part of the subject matter of the divorce action? If it did, it is obvious that the Judges and laws of Hawaii should control, for they first acquired jurisdiction.

We deem it proper to merely outline our position on this question.

If the alienation of the wife's personal estate was a *necessary incident* of the divorce decree, it must follow that Mrs. McGrew could not by removing to California deprive the Court of the jurisdiction already acquired.

If by reason of the mandatory character of the statute, no divorce in Hawaii for the special ground named could possibly be had without the alienation of the wife's personal estate, and if this effect must follow as a matter of law, any attempt of the Court to rule otherwise would have been nugatory, for the desired results were produced by the law and not by the words entered in the decree.

Bamford v. *Id.*, 4 Oregon, 30.
Bishop on Marriage and Divorce, Sec. 1521.
Story on Conflict of Law, Sec. 230–b.

That therefore the change of domicile of Mrs. McGrew pending the litigation is an immaterial factor for if she *had remained in Hawaii* her property right would not have been affected if it was not already involved in the divorce proceedings.

Conclusion.

We therefore respectfully submit that this motion should be denied, and that a consideration of the matters referred to in the motion which affect the merits of the case should be postponed until the regular hearing of the cause, when the same can be fully and orally presented to this Court and on these grounds:

(1.) The Federal question was before the State Courts and was ruled against the plaintiff in error.

(2.) Whether the Hawaiin judgment was binding under the decisions of this Court or under the treaty in question, and what was the effect of the change of domicile of Mrs. McGrew pending the divorce action, are questions going to the merits of the case and should not be finally ruled against the plaintiff in error on this motion.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
FREDERIC D. MCKENNEY,
W. H. CHICKERING,
WARREN GREGORY,
Of Counsel.

No. 336. 109

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JAMES H. McKENNEY, Clerk.

Supreme Court of the United States,

Supp. to Br. for P. in Error

OCTOBER TERM, 1901.

No. 336.

Filed Nov. 5, 1901.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

ALPHONSINE McGREW,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

APPENDIX TO BRIEF OF PLAINTIFF IN ERROR CONTAINING OPINIONS OF HAWAIIAN COURT IN CASE OF CARTER ADMINISTRATOR OF McGREW, DECEASED, VS. THE MUTUAL LIFE INS. CO., ESTABLISHING TITLE TO INSURANCE POLICY IN SUCH ADMINISTRATOR.

APPENDIX.

JOSEPH O. CARTER, Administrator of the Estate of HENRI G. MCGREW, deceased,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

These opinions are reported in 10 Hawaiian Reports, 117, 570.

QUESTIONS RESERVED BY CIRCUIT COURT, FIRST CIRCUIT.

Submitted July 12, 1895. Decided August 15, 1895.

JUDD, C. J., FREAR, J., and Mr. CECIL BROWN of the Bar, in place BICKERTON, J., absent from illness.

A policy of insurance was issued to M, payable upon his death to "A, wife of M, if living; if not living, to his executors, administrators or assigns." M afterwards obtained in the Circuit Court a decree of divorce from A for her adultery. A took exceptions to the decree, but did not get them certified to the Supreme Court. M subsequently died. Held:

(1.) In an action at law by the administrator of M's estate on the policy A need not be made a party.

(2.) The decree of divorce was absolute and is still in effect.

(3.) Exceptions to the decree granting the divorce, so far as property rights were involved, might have been taken to and argued and determined in the Supreme Court, notwithstanding the death of the libellant.

(4.) The insurance, so far as the construction of the policy is concerned, is payable to A, notwithstanding the fact that she was not M's wife at the time of his death ; but,

(5.) By Civ. Code, Sec. 1331, A's interest in the policy passed upon the divorce to M to the administrator of whose estate the insurance is now payable.

Opinion of the Court by Frear, J.

This is an action on a policy of insurance issued by the defendant company upon the life of Henri McGrew for $5,000 payable upon his death to "Alphonsine McGrew, wife of Henri G. McGrew, * * * * * if living ; if not living, to his executors, administrators or assigns." The company stands ready to pay the money, but desires that it be first judicially determined who is entitled to it—whether Alphonsine McGrew or the administrator of the insured. The doubt upon this point is occasioned by the fact that the insured, prior to his decease, obtained a decree of divorce from his wife on the ground of adultery, the validity and effect of which decree are questioned.

The contract of insurance was entered into in the Hawaiian Islands ; the policy is dated September 14, 1892, it was issued to Henri G. McGrew, upon his application ; he retained possession of it and paid all premiums upon it ; he died October 22, 1894 ; at the time of entering into the contract and until his death he was a subject and resident of and domiciled in these islands ; J. O. Carter is the duly appointed administrator of his estate ; all conditions and requirements necessary to be performed or complied with by the decedent or plaintiff have been performed and complied with.

The case was tried in the Circuit Court, First Circuit, jury waived, upon agreed facts, and comes here with

the following questions reserved by the Circuit Court on motion of both parties:

1. Is Alphonsine McGrew a necessary party to this case?

2. Were H. G. McGrew and Alphonsine McGrew divorced; and if so, is the decree of divorce still in effect?

3. Is the amount due on Henry G. McGrew's insurance payable to J. O. Carter, administrator of the estate of H. G. McGrew?

First, this is not a suit in equity, as by bill of interpleader, but an action at law, and therefore, obviously not only is it unnecessary, but it would be improper, to make Alphonsine McGrew a party. This is practically conceded by the defendant.

Secondly, it appears by the agreed statement of facts, including the record in the divorce case, which is made a part of the agreed statement, that on the 24th of August, 1894, an absolute decree of divorce from the bonds of matrimony was decreed by the Circuit Court, First Circuit, of the Hawaiian Islands, in favor of Henri G. McGrew against his wife, Alphonsine McGrew, for adultery on her part; that on the 27th of the same month it was stipulated that it should not be incumbent upon libelee's counsel to present his bill of exceptions until one week after he had been furnished with a transcript of the evidence; that on the 24th of September following he was furnished with such transcript; that on the 1st of October following he filed a paper purporting to be a bill of exceptions; that on the next day libellant's counsel moved the Supreme Court to set the cause for hearing on the alleged bill of exceptions, but that libellee's counsel objected on the ground that the bill had not been signed or allowed by the Circuit Court, and that the motion was denied on that ground;

that Henri G. McGrew died on the 22d of the same month; and that no bill of exceptions was ever allowed by the Circuit Court.

The statute (Comp. L., p. 437) provides that in matters of divorce, "Any party aggrieved by any order or decision of the Circuit Court, may except thereto, and his exceptions shall be duly noted, and certified to the Supreme Court, and no order or decree for a divorce shall be made absolute until such exceptions shall have been disposed of. Said exceptions shall be argued and determined in the Supreme Court, sitting in banco, and if the Court in banco shall be of opinion that the order or decision excepted to in said Circuit Court was erroneous, they shall so certify, and thereupon the case shall be heard anew."

It argued in the first place that the decree of divorce never became absolute because the alleged exceptions were never argued and determined in the Supreme Court.

The practice here in divorce as in other law cases has usually been to enter at once in the Circuit Court an absolute decree or judgment, which is subject to be set aside by the Supreme Court on exceptions. This is what is meant by the provisions of the statute that "no order or decree for a divorce shall be made absolute until such exceptions have been disposed of." An absolute decree is made at once, but, if excepted to, it may be set aside by the Supreme Court. If not excepted to, it is and remains absolute. This has been the construction placed upon the statute in practice and is in harmony with the more general provisions and the practice thereunder, relating to exceptions in all law cases (Laws of 1892, Ch. 57, Secs. 72–78). The "exceptions" referred to in the statute are "exceptions allowed" or "certified to the Supreme Court." If they

were merely exceptions alleged to have been made by counsel, whether allowed or certified or not by the Court, and if no absolute decree could be made until such exceptions were argued and determined in the Supreme Court it would be in the power of the party against whom a decree of divorce has been made to forever prevent the decree from becoming absolute by merely filing alleged exceptions, perhaps wholly "unconformable to truth," and never following them up, or attempting to have them allowed or certified, but on the contrary resisting all endeavors on the part of the opposite party to have them disposed of. In this case it appears that no exceptions have ever been allowed or certified to the Supreme Court, and from all the circumstances, it would seem that the libelee had abandoned her intention, if she ever had any, of getting any exceptions allowed if she could, and having them argued and determined in the Supreme Court.

But it is further argued that the divorce case was abated by the death of Henri G. McGrew, and that even if the libelee had desired to take further action on her alleged exceptions she could not have done so. It seems to us that if the libelee had not for other reasons lost her right to take the case to the Supreme Court on exceptions, she might have done so even after the death of the libellant. Such seems to be the current of authority as to decrees granting divorces in so far as property rights are involved. See Shafer *v.* Shafer, 30 Mich., 163; Downer *v.* Howard, 44 Wis., 82; Wren *v.* Moss, 7 Ill., 72; Danforth *v.* Danforth, 111 Ill., 236; Thomas *v.* Thomas, 57 Md., 504, referred to in 5 Am. & Eng. Enc. 773, Wilson *v.* Wilson, 73 Mich., 620; Barney *v.* Barney, 14 Ia., 189; Kimball *v.* Kimball, 44 N. H., 122.

Thirdly, assuming, then, that the parties were divorced, who is entitled to the insurance? It is argued that since it is payable to "Alphonsine McGrew,

wife of Henri McGrew," payment to her is conditioned upon her being his wife at the time of his death, and that since a divorce had taken place she was not then his wife. No such condition can fairly be implied from the words of the policy. The insurance is payable to the person named, "Alphonsine McGrew," and the only condition annexed to the payment to her is that she shall be living at the time of the death of the insured. The words are, "if living." The words "wife of Henri G. McGrew" are words merely of description, not of condition. What provision the insured might have made, had he contemplated the possibility of a divorce is not for us to say or to give effect to. The policy must be construed as it is. That the word "wife" as here used is mere descriptive, and that the insurable interest of the beneficiary need not continue, or that there need not even be an insurable interest in the first place, the insurance having been effected by the insured and not by the beneficiary (see Conn., &c., Co. *vs.* Schaefer, 94 U. S., 457; Vivar *vs.* Knights of Pythias, 52 N. J. Eq., 455; McKee *vs.* The Phœnix, &c., Co., 28 Mo., 383; Overbeck *vs.* Overbeck, 155 Pa. St., 5.

But it is provided by statute (Civil Code, Sect. 1331) that "when a divorce is decreed for the adultery or other offence amounting thereto, of the wife, the husband shall hold her personal estate forever." By this statute, the interest of Alphonsine McGrew under this policy passed upon the divorce to her husband, and the insurance is now payable to the administrator of his estate. The policy and her interest under it were personal estate, and, the contract having been entered into in these islands, the divorce having been granted here, and the parties having been domiciled here, the beneficiary must be determined by the laws of these islands.

The first question reserved must be answered in the negative, the other two questions in the affirmative, and the case is remanded to the Circuit Court for such further proceedings as may be proper.

CARTER & KINNEY for Plaintiff.
W. R. CASTLE for Defendant.

J. O. CARTER, Administrator of the Estate of H. G. McGrew, deceased,

v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

MOTION OF REHEARING

Submitted March 11, 1896.
Decided December 19, 1896.

JUDD, C. J., FREAR, J., and CECIL BROWN, Esq., of the Bar, in place of WHITING, J., disqualified.

The question of the effect of a divorce upon the ownership of a policy of life insurance, or the right to the proceeds thereof, is not a question of the construction of the policy.

The provision in an application for life insurance that it is made "subject to the charter of the company and the laws of the State of New York," is not an agreement that the question of the effect of a foreign divorce upon the ownership of the policy or the proceeds thereof shall be determined by the statutory law of New York.

By private international law the effect of such divorce should be determined by the law of the place of domicil and divorce.

A rehearing will not be granted for argument by new counsel upon a question raised at the first hearing, but which former counsel chose not to argue, at least if it does not appear that a new argument would probably lead to a different result.

A rehearing will not be granted in order to allow argument upon a question of the constitutionality of a

statute, even though that question was not argued at the first hearing, where the unconstitutionality of the statute was not made a ground of the motion for a rehearing and it does not appear that an argument upon the question would prbably lead to a reversal of the decision.

Where a Court has acquired jurisdiction in divorce proceedings over both parties at the place of their domicil and afterwards decrees a divorce, the effect of the divorce upon the disposition of the personal estate of the wife will not be affected by a change of residence of the wife previous to the signing of the decree.

Opinion of the Court by Frear, J.

The former decision, *ante*, p. 117, in this case was filed August 15, 1895. On October 4, 1895, new counsel for the defendant filed a motion for a rehearing, based on a number of grounds therein set forth. On March 6, 1896, he filed additional grounds. Opposing counsel objected to the Court's entertaining the motion on the grounds of defendant's laches in filing the same and its acquiescence in the judgment. Affidavits were filed on both sides. The Court thought it best to hear argument upon the motion itself as well as upon the preliminary question of laches and acquiescence, and now, in view of all the circumstances and of our conclusion, we believe it will be more satisfactory to consider the motion entirely upon its merits, without going into the question of laches and acquiescence at all.

The points relied upon by the defendant's counsel in his able and elaborate brief will be considered in their order. We regretted much at the first hearing that we were not thus favored with full argument on behalf of the defendant, except upon one of the many interesting questions involved in the case and at that time argued by plaintiff's counsel or suggested by the Court. The

decision was rendered at an early date, as requested on behalf of the defendant, in such light as the Court then had, and yet in the light of the full argument now presented, we do not find sufficient ground for allowing a rehearing. We come to this conclusion fully realizing both that if a rehearing should be granted, it would by no means imply that the former decision was erroneous, and that the merits of the case are not involved in the disposal of the motion, although, as found by counsel in argument, the merits must necessarily be considered to some extent.

The first point relied on is, that the Court manifestly erred in construing the policy as an Hawaiian contract, whereas, it appears upon its face to be a New York contract. The case was submitted upon an agreed statement of facts in which it was expressly agreed that the "contract of insurance was made and entered into in the Hawaiin Islands." This is all that was assumed in the decision, namely, in the words, "the contract having been entered into in these islands." But it is argued that the agreed statement cannot be construed as an admission that the policy was an Hawaiian contract. If so, the decision also cannot be construed as holding that, for its language is that of the agreed statement.

It is further argued that, if the agreed statement does contain such admission, then counsel, who signed it, exceeded his authority in so doing and the defendant is not bound thereby. If the statement did contain such admission, the Court would have been perfectly justified in acting upon it. When a case is submitted to the Court upon an agreed statement of facts signed by responsible counsel, it certainly would not be the duty of the Court, it would not be proper to assume that counsel was acting without authority and then decide the case upon the facts directly contrary to those upon which the case was submitted, and especially where as

in this case the admission if made, might under certain circumstances be in accordance with the facts notwithstanding the particular language of the policy or other documents before the Court. But it is unnecessary to decide whether the agreed statement did contain such admission, or if it did, whether an attorney at law could as such properly make such an admission, or if not, whether such admission, if made, was in fact authorized or acquiesced in by the defendant itself. For the Court did not as matter of fact construe the policy as a Hawaiian contract. It construed it precisely as requested by defendant's counsel (holding that the word "wife" in the policy was a word of description, not of condition) in accordance with the judicial decisions elsewhere in similar cases, which so far as appears would be followed in New York as well as in Hawaii. Not a single New York decision or statute was then cited upon this point by counsel on either side, but it was assumed by the Court and by counsel on both sides that the law upon this question was the same in New York as elsewhere, and the view taken by the Court as to what that law is, is conceded by defendant's present counsel to be correct. It is true the Court spoke of the contract as "entered into in these islands," but even if those words should be construed as holding that the policy was a Hawiian contract (a construction which defendant's counsel argues cannot be placed upon similar words in the agreed statement) still the words were inserted in the decision merely for what they were worth. They were not then and are not now regarded by the Court as of much importance. The facts of importance, stated in the same sentence, were that the divorce was granted and the parties were domiciled here. Even these facts were not alluded to as having

any bearing upon the question of the construction of the policy. The Court had finished its comment upon that question and was then upon the question of ownership. And this seems to be the source of misunderstanding in this case. Construction is confused with ownership. If A had possession of certain personal property under a contract it might be a question of the construction of the contract whether A's interest was in his own right, and if so, what that interest was, or, if A had died, it might be a question of construction whether the property should then pass to A's representatives or to some one else. These questions would be decided by the law of the place of contract. But suppose the contract were construed as having passed the property absolutely to A and his representatives, the further question who were the representatives would be one, not of construction, but of distribution, to be solved by the law of the place, not of the contract, but of A's domicil. Or, suppose A had previously assigned the property, his representatives would not take it all—not because of an erroneous construction of the contract by the law of domicil, or any other law, but because the ownership of the property had changed—a question which might necessarily be determined by some other law, as the law of the place of assignment, if that were a different place. So, if A had become bankrupt and the property had become assigned by operation of law to his assignee in bankruptcy. So, if A had married and the property had passed by law to her husband, so, as in this case, if a divorce had been obtained against her, and the property had thereupon passed to her husband by operation of law. To allow an assignee of a contract to recover, is not to vary the terms of the original contract, but to enforce the terms of the contract of assignment.

It is further argued, that, if the mere fact that the policy is a New York contract is not sufficient to require the New York law to govern in determining the question of assignment by operation of law, as distinguished from the question of construction, yet it is expressly provided in the policy that the New York law should govern and it was competent for the parties to so agree. Let us assume that such an agreement, if made, would have been valid. The provision referred to is not in the policy proper, a copy of which was before the Court, but in the application, which, although in terms made a part of the policy, was not before the Court and has not to this day been seen by the Court. This provision is stated in the brief as follows: "This application is made to the Mutual Life Insurance Co. of New York, subject to the Charter of the Company and the laws of the State of New York." An application which the parties themselves did not make a part of the case and which the Court had never had an opportunity of seeing, could not be considered. Even if it had been a part of the case, the Court would still have been in the dark as to the provisions of "the Charter of the Company and the laws of the State of New York," no proof of which was made. In the present counsel's brief, to be sure, reference is made to an old New York statute differing slightly from our own former statute upon the subject under consideration, but no such reference was made at the first hearing, and if it had been made, would it have been sufficient proof of what the New York law is at present, and might not the charter have contained some other provision, for, if the parties may have agreed that the property in the policy should pass in a manner different from that prescribed by Hawaiian law, may they not also have agreed similarly as to New York law? But, aside from all this, we do not see how an agree-

ment that the application is made subject to the charter of the company and the laws of the State of New York, can be construed as an agreement that the ownership of the policy itself after it has issued or the right to the proceeds thereof should be determined by that charter or those laws. Not merely because the application is not the policy, though part of it, for even if the policy itself had been issued expressly subject to the same charter and laws (and it probably was issued subject thereto whether expressly so stated or not) this could not mean that the New York statutory law should govern every question that might subsequently arise in relation to the policy—its ownership, the court in which or the procedure by which it should be enforced, the persons who would be the insured representatives in case he survived his wife, &c. Indeed, New York law must be assumed to include provate international law, by which the effect of a divorce upon the ownership of personal property is determined by the law of the place of divorce at least if that is also the place of domicil—the New York statute upon the subject so far as it relates to personal property being presumed to apply only to divorces granted in that state. In considering this question, should be borne in mind that the specific provision in the policy relating to assignment is not involved.

The company, not having brought the widow into court by interpleader, is in the unfortunate position of being subjected to two suits—one by the administrator here, the other by the widow in California. It must now rely upon the assumption that the two courts will take the same view of the law. There can be no doubt that the same law should govern whether the action is brought in Hawaii, California or New York. In our opinion that law is the law of the place of domicil and

divorce. We can only assume that the Clifornia Court will take the same view.

The next point relied on is that, if Hawaiian law, that is, the law of the place of domicil and divorce, is to govern, that law did not pass the policy in question to the husband. The statute (Civ. Code, Sec. 1331), provided that "When a divorce is decreed for the adultery * * * of the wife, the husband shall hold her personal estate forever. * * *" The argument is that, as the Court has held that the former statute (Civ. Code, Sec. 1286), upon the rights of husband and wife, which made the husband "the virtual owner" of the "Movable property" of his wife, was substantially an enactment of the common law upon the subject and therefore did not pass the wife's choses in action to the husband until reduced to possession by him, so it must by analogy hold that under the statute now in question the wife's choses in action did not pass to the husband under the description of "personal estate" until reduced to possession and that as the husband did not in this case reduce the policy in question to possession during his lifetime the wife was entitled to it. The question whether the policy was "personal estate" within the meaning of the statute was argued by counsel for the plaintiff at the former hearing, and was considered and decided by the Court, though this particular phase of the argument was not gone into. A rehearing should not be granted merely to allow new counsel for the defendant to present argument upon a question raised at the first hearing, but which former counsel for the defendant then chose not to argue, at least where, as we believe to be the case here, a rehearing would probably not result in a different decision. For, even if it could be assumed from the facts agreed upon that the husband had not reduced the policy to possession during his lifetime, still the

statute in question could not, like the other statute referred to, be presumed to have been intended to be an enactment of the common law, so as to be subject to the alleged exception relating to choses in action, for the common law upon this subject was totally different; it did not allow the husband to reduce to possession his wife's choses in action after divorce at all; after divorce he is no longer husband; his right to the wife's choses in action then is not a marital right; marital rights no longer exist; the right is one of property under the statute. The words "personal estate" used in the statute naturally include all personal estate whether in action or possession.

The next point relied on is that the statute in question (Section 1331) was repealed by implication by the Married Woman's Act of 1888. This point was considered by the Court before rendering its decision, and, if we remember rightly, was also suggested to counsel at the hearing, but was not touched upon in the decision because counsel had not cared to argue it. Very probably the legislature which passed the Act of 1889 emancipating married women from the harsh provisions of the common law would have also repealed the section in question, if it had been brought to its notice. But this is only a matter of probability as to what would have been done. It was not in fact done. The section is not inconsistent with that Act. It may be regarded as a special provision for a penalty or forfeiture in case of a divorce for the offense of adultery. We are glad to note that the section has since been repealed by an Act introduced by Senator Brown, who, as substitute judge took part in the former decision and now takes part in this.

The point made in the brief that Section 1331 is unconstitutional was not made a ground in the motion for

rehearing. We need only add that we fail to see the force of the learned argument upon this point.

The next point is, that Section 1331 did not apply to the property in question, because at the time of the divorce neither the wife nor the policy were in this country or within the jurisdiction of the Court—the wife because she had gone to California, the policy because, although it remained here in the possession of the husband, being personal property it followed its owner, the wife, in contemplation of law. We presume that by this is meant, not that personal property follows its owner wherever the latter may happen to go temporarily, but that it is governed by the law of the owner's domicil, or residence *animo manendi*. Now there was no proof whatever that the wife in this case intended to change her domicil, which had previously been here, and which in the absence of proof to the contrary would, at least after so short an absence, be presumed to continue here, to say nothing of the rule that the wife's domicil is that of her husband, except under certain special circumstances. But however that may be, both parties were undoubtedly domiciled here when the divorce proceedings were commenced, and when the Court acquired jurisdiction over them, and that was sufficient so far as the question of domicil was concerned. The Court having acquired jurisdiction under these circumstances, the incidents of the divorce would follow according to the law of the place of divorce.

Finally, it is argued that the divorce had not become absolute because the exceptions taken in the divorce proceedings had not been disposed of (Comp. L., p. 437). The construction of this statute was argued and decided

at the first hearing, and we are practically asked to go over the same ground again. The only criticism made upon the former decision of this question is based upon a misconstruction of that decision.

The motion for a rehearing is denied.

W. A. KINNEY, for plaintiff.

L. A. THURSTON, for defendant.